IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

03-CR-143-S

BRUCE E. WALLEY,

Defendant.

REPORT

The grand jury has charged defendant Bruce E. Walley in a one-count indictment with health care fraud in violation of 18 U.S.C. 1035. Specifically, the indictment charges that from December 20, 2000 until April 4, 2002, Walley, while working as a nurse in a residential care facility, knowingly and willfully concealed first his exclusion from federal health care programs, and then the subsequent suspension of his Wisconsin nursing license.

Walley has moved pursuant to F. R. Cr. P. 7(d) to strike from the indictment all language relating to the suspension of his Wisconsin nursing license, arguing that this information is immaterial and prejudicial. The government disagrees,, arguing that the challenged language is relevant to the charge and not unfairly prejudicial. The government is correct and I am recommending that the court deny Walley's motion.

Trial courts have discretion under Rule 7(d) to strike surplusage from an indictment if it deems the language immaterial, irrelevant or prejudicial. *United States v. Marshall*, 985 F.2d 901, 905-06 (7th Cir. 1993).Several courts have held that motions to strike surplusage should be granted

> only if the targeted allegations are *clearly not* relevant to the charge *and* are inflammatory and prejudicial. . . . This is a rather exacting standard, and only rarely has surplusage been ordered stricken.

United States v. Andrews, 749 F.Supp. 1517, 1518 (N.D. Ill. 1990), emphasis in original, quoting *United States v. Chaverra-Cardona*, 667 F. Supp. 609, 611 (N.D. Ill. 1987). These decisions are not binding on this court, but they provide helpful context

The following timeline paraphrases the indictment's allegations in paragraph 1 (using the indictment's letter designations):

(d) November 13, 1996: Iowa licenses Walley as a registered nurse.

(e) August 30, 1999: Wisconsin licenses Walley as a registered nurse.

(f) January 20, 2000: Iowa Board of Nursing revokes Walley's license for inaccurately documenting administration of controlled substances, failing properly to assess a patient, and failing properly to chart patient assessment.

(g) July 9, 2000: Walley begins work as a registered nurse at a Minocqua residential facility.

(h) December 20, 2000: United States Department of Health and Human Services excludes Walley from participation in Medicare, Medicaid and all federal healthcare programs.

(i) "On December 18, 2001, defendant's Wisconsin nursing license was suspended for the failure to submit documentation of assessment that he may safely and competently practice as a professional nurse in the State of Wisconsin, after having been previously ordered on August 18, 2001, to provide such documentation." (*This is a direct quote from the indictment*)

(j) March 24, 2002: Walley stops working at the residential care facility, and is taken off the payroll on April 4, 2002.

Paragraph 2 of the indictment states the actual charge:

> Beginning on or about December 20, 2000 and continuing to on or about April 4, 2002, in the Western District of Wisconsin, the defendant Bruce E. Walley, knowingly and willfully concealed and covered up, by trick, scheme and device material facts, specifically, his exclusion from Medicaid all Federal healthcare programs *and the suspension of his Wisconsin nursing license*, in connection with his employment at Our Home II in Minocqua, Wisconsin, and the delivery and receipt of payments for healthcare benefits, items or services under the health care benefit program.

Walley seeks to strike as surplusage the entire paragraph quoted at 1(i) above, and the italicized language in the charging paragraph. Walley argues that the suspension of his Wisconsin nursing license "is not an essential or necessary element of the offense charged." Brief in Support of Motion to Strike, Dkt. 17, at 3. According to Walley, the only material fact that he can be accused of having concealed is his exclusion from Medicaid and federal healthcare programs on December 20, 2000; therefore, advising the jury that Wisconsin suspended his nursing license a year later not only is prejudicial, but confusing. In essence, Walley argues that once he's been disqualified from his job by one sanction, subsequent, unrelated sanctions that also would disqualify him if standing alone are irrelevant and prejudicial.

The government agrees that the license suspension allegations are prejudicial in the sense that they can prove Walley guilty of the crime charged, but it dryly notes that this is the whole point of a federal prosecution: absent submission of evidence prejudicial to a defendant, the government would never convict anybody. Put another way, argues the government, if the language in an indictment is "legally relevant" then it should not be stricken "no matter how prejudicial it may be." *United States v. Climatemp, Inc.*, 482 F. Supp. 376, 391 (N.D. Ill. 1979); *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990). "Motions to strike portions of the indictment should be granted only if the targeted allegations are clearly not relevant to the charge and are inflammatory and prejudicial." *United States v. Stoecker*, 920 F. Supp. 876, 887 (N.D. Ill. 1996).

In his reply, Walley contends that the government, in arguing its position, has not accurately set forth the sequence of events. Walley points out that he was not suspended when he took the job, and that he received the federal exclusion from program participation before Wisconsin suspended his nursing license. If I am interpreting Walley's argument correctly, once he received his federal exclusion, the alleged material concealment in violation of § 1035 vested. Therefore, it was–and is–legally immaterial that Wisconsin subsequently suspended his nursing license because the alleged crime already had been committed.

This argument makes sense on some levels, but it is uncompelling in this case. First, the grand jury actually has charged Walley's ongoing concealment of his Wisconsin license suspension as one of the material facts that violates § 1035. It is a stand-alone alternate

basis for a finding of guilt. At trial, the court will instruct the jury that it may find that *either* of these alleged material concealments is, by itself, a basis to convict Walley of the charge. *See* Draft Jury Instructions at 9, attached to January 15, 2004 Order (dkt. 18). Conceivably, the government could have charged this alleged act of concealment as a second count in the indictment; it chose not to, instead charging it as a second allegedly material fact concealed by Walley in a continuing course of conduct spanning fifteen months. Walley cannot leverage this fortuity into the deletion of an appropriate alternate ground for the jury to find him guilty. The challenged language could not be more relevant to the crime charged, nor could the alleged prejudice be less unfair.

As a second, related point, even if the Wisconsin license suspension were not part of the actual charge, it would be relevant to proving Walley's willfulness, which is another element of the crime. The court will not finally decide how to phrase its definition of "willfully" until the final pretrial conference, but whatever the words used, that instruction will convey the notion that Walley acted in conscious disregard of a known legal duty. However clear it might have been to Walley that he could not continue to work at Our Home II following his December 20, 2000 exclusion from federally funded health care programs, the wrongfulness of his continued employment at the facility would have been that much clearer to him (and to a jury) following the December 18, 2001 suspension of his Wisconsin nursing license. Yet, Walley allegedly continued to work at Our Home II until March 24, 2002.

In short, all of the challenged language is relevant and material, and it is not unfairly prejudicial. Walley is not entitled to relief under Rule 7(d).

RECOMMENDATION

For the reasons stated above and pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that this court deny defendant Bruce Walley's motion to strike surplusage from the indictment.

Entered this 29th day of January, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge